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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-184

ZACHARY KILLEBREW,
Petitioner,

vs.

SECURITY BARGE LINE, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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INDEX

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Statutory Provisions Involved 3

Statement of the Case 5

Reasons for Granting the Writ:

1. The Decision of the Court Below Is in Glaring Conflict with the Decisions of This Court Regarding the Sufficiency of Evidence Needed to Submit a Jones Act Case to the Jury and Is Based on Legal Conclusions in Direct Opposition with the Decisions of This Court and the Lower Federal Courts 9
2. The Opinion of the Court Below Evidences a Total Misconception of the Admiralty Doctrine of Unseaworthiness Which Resulted in a Decision in Clear Conflict with the Decisions of This Court and the Other Federal Courts, Not Only on the Submission of Unseaworthiness Claims to the Jury But on What Conditions Might Render a Vessel Unseaworthy 17

Conclusion 20

Certificate Service 20

Appendix—

Opinion of Supreme Court of the State of Mississippi and Order Denying Petition for Rehearing A1

Supreme Court of Mississippi Decisions Handed Down June 18, 1973 ..... A10

Citations

CASES

Armit v. *Loveland*, 115 F. 2d 308 (3rd Cir. 1940) 15
Atlantic & Gulf Stevedores v. *Ellerman Lines, Ltd.*, 369 U. S. 355, 82 S. Ct. 780, 7 L. Ed. 2d 798 (1962) 19
Beadle v. *Spencer*, 298 U. S. 124, 56 S. Ct. 712, 80 L. Ed. 1082 (1936) 12
Blair v. *Baltimore & O. R. Co.*, 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490 (1945) 16
Brady v. *Southern R. Co.*, 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 239 (1943) 16
Butler v. *Whiteman*, 356 U. S. 271, 78 S. Ct. 734, 2 L. Ed. 2d 754 (1958) 14
Carbon Black Export, Inc. v. *The S. S. Monrosa*, 254 F. 2d 297 (5th Cir. 1958) 13
Carlisle Packing Co. v. *Sandanger*, 259 U. S. 255, 42 S. Ct. 475, 66 L. Ed. 927 (1922) 16
Casselmann v. *The Tug Captain Kelly*, 215 F. Supp. 240 (E. D. La. 1963) 10
Chelentis v. *Luckenbach Steamship Co.*, 247 U. S. 372, 38 S. Ct. 501, 62 L. Ed. 1171 (1918) 16
Chicago, Rock Island & Pacific Ry. v. *Devine*, 239 U. S. 52, 36 S. Ct. 27, 60 L. Ed. 140 (1915) 16
Davis v. *Parkhill-Goodloe Co.*, 302 F. 2d 489 (5th Cir. 1962) 10, 11
Debose v. *Loppersum*, 438 F. 2d 642 (5th Cir. 1971) 10
Ferguson v. *Moore-McCormack Lines*, 352 U. S. 521, 77 S. Ct. 459, 1 L. Ed. 2d 511 (1957) 2, 13, 15
Fleming v. *American Export Isbrandtsen Lines, Inc.*, 451 F. 2d 1329 (2nd Cir. 1971) 14
Garrett v. *Moore-McCormack Co.*, 317 U. S. 239, 63 S. Ct. 246, 87 L. Ed. 239 (1942) 12, 16

Gerald v. *U. S. Lines Co.*, 368 F. 2d 343 (2nd Cir. 1966) 14
Gibson v. *Elgin, Joliet & Eastern Railway Co.*, 246 F. 2d 834 (7th Cir. 1957) 13
Interocean Steamship Co. v. *Topolofsky*, 165 F. 2d 783 (6th Cir. 1948) 10
Jacob v. *City of New York*, 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed. 1166 (1942) 12
Jefferson v. *Taiyo Katum, K. K.*, 310 F. 2d 582 (5th Cir. 1962) 19
Justillian v. *Versaggi*, 169 F. Supp. 71 (S. D. Tex. 1954) 10
LaFont v. *Otto Candies, Inc.*, 369 F. 2d 38 (5th Cir. 1966) 14, 15
Lavender v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1946) 14
Lieberman v. *Matson Navigation Co.*, 300 F. 2d 661 (9th Cir. 1962) 19
Livanos v. *National Bulk Carriers, Inc.*, 248 F. 2d 815 (2nd Cir. 1957) 13
Massey v. *Williams-McWilliams, Inc.*, 414 F. 2d 675 (5th Cir. 1969) 15
Mitchell v. *The Trawler Racer, Inc.*, 362 U. S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941 (1960) 2, 17, 18
Morales v. *City of Galveston*, 291 F. 2d 97 (5th Cir. 1961) 19
Nolan v. *Greene*, 383 F. 2d 814 (6th Cir. 1967) 14
Panama R. Co. v. *Johnson*, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748 (1924) 16
Pope & Talbot, Inc. v. *Hawn*, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953) 16
Rey v. *Colonial Nav. Co.*, 116 F. 2d 580 (2nd Cir. 1941) 15
Rodriguez v. *The Texas Co.*, 254 F. 2d 295 (2nd Cir. 1958) 13

Rogers v. *Missouri Pacific R. Co.*, 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957) 13, 16
Sanford v. *Caswell*, 200 F. 2d 830 (5th Cir. 1953) 15
Schulz v. *Pennsylvania R. Co.*, 350 U. S. 523, 76 S. Ct. 608, 100 L. Ed. 668 (1956) 16
Seaboard Air Line R. Co. v. *Padgett*, 236 U. S. 668, 35 S. Ct. 431, 59 L. Ed. 777 (1915) 16
Security Barge Line, Inc. v. *Killebrew*, 278 So. 2d 460 (Miss. 1973) 1, 9, 10, 12, 17
Socony-Vacuum Oil Co. v. *Smith*, 305 U. S. 424, 59 S. Ct. 262, 83 L. Ed. 265 (1939) 12
Southard v. *Independent Towing Co.*, 453 F. 2d 1115 (3rd Cir. 1971) 15
Southern Shell Fish Co. v. *Plaisance*, 196 F. 2d 312 (5th Cir. 1952) 14
Stevens v. *Seacoast Co.*, 414 F. 2d 1032 (5th Cir. 1969) 10
Street v. *Isthmian Lines, Inc.*, 313 F. 2d 35 (2nd Cir. 1963) 15
The Arizona v. *Anelich*, 298 U. S. 110, 56 S. Ct. 707, 80 L. Ed. 1075 (1936) 12
United States Lines Co. v. *Cummings*, 195 F. 2d 221 (9th Cir. 1952) 15
Usner v. *Luckenbach Overseas Corp.*, 400 U. S. 494, 91 S. Ct. 514, 27 L. Ed. 2d 562 (1971) 2, 17, 18
Varveris v. *U. S. Lines Co.*, 249 F. 2d 89 (2nd Cir. 1957) 13
Vickers v. *Tumey*, 290 F. 2d 426 (5th Cir. 1961) 10, 11, 13
Webb v. *Illinois Central Ry. Co.*, 352 U. S. 512, 77 S. Ct. 451, 1 L. Ed. 2d 503 (1957) 13

STATUTES

45 U.S.C. § 51 ..... 3, 13
45 U.S.C. § 53 4
45 U.S.C. § 54 5
46 U.S.C. § 688 3

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

ZACHARY KILLEBREW,
Petitioner,

vs.

SECURITY BARGE LINE, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

The Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Mississippi entered in the case styled *Security Barge Line, Inc.* v. *Zachary Killebrew* on May 29, 1973, petition for rehearing denied June 18, 1973.

OPINION BELOW

The opinion of the Supreme Court of the State of Mississippi is unofficially reported at 278 So. 2d 460 (Miss. 1973) and appears in the appendix hereto, the opinions of that court are not officially reported. The order of the Supreme Court of the State of Mississippi denying a petition for rehearing, not yet reported, also appears in the appendix hereto.

JURISDICTION

The judgment of the Supreme Court of the State of Mississippi was made and entered on May 29, 1973. A timely petition for rehearing was denied on June 18, 1973, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this court is invoked under 28 U. S. C. 1257 (3).

QUESTIONS PRESENTED

1. Whether the decision of the Mississippi Supreme Court, overturning the verdict of the trial court jury, that, as a matter of law, a green seaman injured in jumping from an empty barge to a loaded barge is precluded from recovery, notwithstanding evidence upon which the jury was entitled to find that there was no warning against this manner of passage although known by the shipowner to be not only dangerous, but common among the deckhands and also that there was inadequate equipment for safe passage between barges, is inconsistent with the legion of cases decided by this Court, illustrated by *Ferguson* v. *Moore-McCormack Lines*, 352 U. S. 521, 523, 77 S. Ct. 459, 1 L. Ed. 2d 511, 514 (1957) that, under the Jones Act ". . . the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury. . . ."

2. Whether a state appellate court can reverse a jury's finding of unseaworthiness under the authority of *Usner* v. *Luckenbach Overseas Corp.*, 400 U. S. 494, 91 S. Ct. 514, 27 L. Ed. 2d 562 (1971), reh. den. 401 U. S. 1015, 91 S. Ct. 1247, 28 L. Ed. 2d 552, and *Mitchell* v. *The Trawler Racer, Inc.*, 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941 (1960) when from the evidence in the record the jury had every right to believe that the injured novice seaman was never

given any instruction on the proper method of traveling between barges nor informed of the existence of, or provided with, any equipment he might employ to cover this distance safely.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 46:

§ 688. Recovery for injury to or death of seaman

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the commonlaw right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

United States Code, Title 45:

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

"Every common carrier by railroad while engaging in commerce between any of the several States or Ter-

ritories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, tract, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

United States Code, Title 45:

§ 53. Contributory negligence; diminution of damages

"In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an em-

ployee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

United States Code, Title 45:

§ 54. Assumption of risks of employment

"In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

STATEMENT OF THE CASE

On August 24, 1971, petitioner, Zachary Killebrew, filed this action against Security Barge Line, Inc. in the Circuit Court of Washington County, Mississippi, under the "savings to suitors" clause of 28 U. S. C. § 1333. Petitioner alleged in his declaration that he sustained per-

sonal injuries while working as a seaman on respondent's vessel, the M/V ISSAQUENA, on the navigable waters of the United States as a result of the negligence of respondent and the unseaworthiness of its vessel.

At the conclusion of the trial on August 15, 1972, respondent raised a federal question when a directed verdict was requested. This request was denied and the jury, having been properly instructed on the Jones Act claim (R. 287-292) and unseaworthiness claim (R. 293-300), as announced by the decisions of this Court and the lower federal courts, unanimously found for petitioner assessing his damages in the amount of $60,000.00. After taking all issues under advisement, the trial court sustained respondent's motion for new trial on damages only unless petitioner remit all sums in excess of $35,000.00. Petitioner made remission accordingly, judgment was rendered thereon and both parties filed their respective notices of appeal to the Supreme Court of the State of Mississippi. The evidence supporting the jury's verdict is summarized below:

The undisputed testimony in the record established that:

(a) Petitioner was never instructed on the proper method of traveling between barges. (R. 74)

(b) Petitioner was an inexperienced, untrained seaman. (R. 70)

(c) The Captain of the M/V ISSAQUENA realized that as an untrained, inexperienced deckhand, petitioner was more likely to be injured than a man with more experience. (R. 229, 230)

(d) The mate of the vessel was responsible for instructing the crew in operating practices, including safety hazards. (R. 63)

(e) The safety rule forbidding crew members from jumping between barges was not enforced. (R. 256)

(f) Petitioner was never instructed to read the safety rules aboard the vessel, nor did he ever read them. (R. 75)

(g) The Captain of the M/V ISSAQUENA knew petitioner jumped from barge to barge and never told him to stop this practice. (R. 82)

(h) The only equipment aboard the M/V ISSAQUENA for traveling between barges was one eight foot standard step ladder. (R. 254)

(i) The ladder provided by the M/V ISSAQUENA was kept on the vessel itself, not out on the tow. (R. 248)

(j) Petitioner was never instructed to use the ladder. (R. 265)

(k) The crew of the M/V ISSAQUENA did not use the ladder to cross between barges. (R. 265)

(l) Petitioner was ordered to string out the lights on the tow. (R. 73)

(m) Petitioner, in order to finish stringing the lights, had to return to the loaded barge. (R. 98)

Although there was some conflict in the testimony, the jury was entitled to believe that:

(a) The petitioner was never given any safety instruction whatsoever. (R. 74)

(b) No member of the crew was ever given safety instruction. (R. 88)

(c) The distance between the empty barge, from which petitioner jumped, to the loaded barge was four feet across and three feet down. (R. 132)

(d) It would have been unsafe for petitioner to have held onto the edge of the empty barge and pushed off and dropped to the loaded barge. (R. 132)

(e) It would have been unsafe for petitioner to have tried to extend his legs from the empty barge to the coaming of the loaded barge. (R. 132)

(f) Petitioner could not have stepped from the tow-knee of the M/V ISSAQUENA to the loaded barge, a jump would have been required. (R. 94)

(g) A safe ladder for use in traveling between barges could have been provided. (R. 250)

(h) Petitioner ruptured an intervertebral disc when he landed on the loaded barge. (R. 155, 156)

The brief submitted by the appellee below, petitioner here, to the Supreme Court of Mississippi clearly pointed out that under the controlling federal decisions, Jones Act negligence claims are to be submitted to the jury whenever there is evidence of negligence which played any part, even the slightest, in producing the injury. Petitioner also pointed out the controlling federal maritime law in the areas of unseaworthiness, assumption of risk, and the duty to instruct a novice seaman.

The federal maritime law was evidently found unpalatable because on appeal the Supreme Court of the State of Mississippi reversed and rendered holding that the record established no evidence of negligence or unseaworthiness and the trial court should have directed a verdict for the defendant.

On June 7, 1973, petitioner filed a timely petition for rehearing with the Supreme Court of the State of Mississippi alleging that the court had erred in reversing and rendering the verdict of the trial court jury under

the controlling federal decisions and that the court had committed certain procedural errors.

On June 18, 1973, the Supreme Court of the State of Mississippi denied petitioner's petition for rehearing of this matter.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court Below Is in Glaring Conflict with the Decisions of This Court Regarding the Sufficiency of Evidence Needed to Submit a Jones Act Case to the Jury and Is Based on Legal Conclusions in Direct Opposition with the Decisions of This Court and the Lower Federal Courts.

In reversing the verdict of the trial court jury, the Mississippi Supreme Court stated: "the appellee simply did not make out a case, and the court should have directed a verdict for the appellant." *Security Barge Line, Inc.* v. *Killebrew*, 278 So. 2d 460, 464 (Miss. 1973). This holding was apparently based upon that court's legal conclusions that petitioner assumed the risk of the injury and that the shipowner was under no duty to instruct petitioner, a novice seaman, not to jump from barge to barge. *Security Barge Line, Inc.* v. *Killebrew*, supra, at 463. The opinion of the court below and the legal conclusions on which it is based are in striking conflict with the decisions of this Court and the lower federal courts.

(A) *Duty to Instruct Novice or "Green" Seaman*

The Mississippi Supreme Court stated, after comparing the factual situation of this case to that of a farmer jumping from the roof of a chickenhouse to the ground, that "(a)n employer is under no duty to instruct an employee that in performing his work he should not jump from a greater height to a lower height." *Security Barge Line, Inc.* v.

Killebrew, supra, at 463. This "down home" wisdom not only ignores that the duty of a shipowner to a crewmember is greater than that in the normal employer-employee relationship (See e. g., *Interocean Steamship Co.* v. *Topolofsky*, 165 F. 2d 783 (6th Cir. 1948)), and the fact that the petitioner was required to travel from a greater height to a lower height to complete his work and that no equipment or instruction was provided to him so that he might safely cover this distance, but typifies the misconceptions under which the court below was laboring.

As authority for this holding, the court cited *Casselmann* v. *The Tug Captain Kelly*, 215 F. Supp. 240 (E. D. La. 1963) and *Debose* v. *Loppersum*, 438 F. 2d 642 (5th Cir. 1971). It is submitted that neither of those cases provide any authority for such a holding. In both cases cited by the court below, the trier of fact found, as a matter of fact, not as a matter of law, that no negligence had been established.

To the contrary, the failure to instruct a novice seaman has repeatedly been held sufficient to submit a Jones Act case to the trier of fact, especially when the injured seaman was untrained, inexperienced and unfamiliar with the hazards of certain conduct. *Stevens* v. *Seacoast Co.*, 414 F. 2d 1032 (5th Cir. 1969), *Davis* v. *Parkhill-Goodloe Co.*, 302 F. 2d 489 (5th Cir. 1962), *Vickers* v. *Tumey*, 290 F. 2d 426 (5th Cir. 1961), *Justillian* v. *Versaggi*, 169 F. Supp. 71 (S. D. Tex. 1954). In both *Davis* and *Stevens* the court noted that because of the inexperience of the injured seaman the defendants had a duty to warn that they might not have had if dealing with a veteran seaman.

In the case before this Court, the uncontradicted testimony establishes that petitioner was inexperienced and untrained (R. 70) and that the Captain of the M/V

ISSAQUENA recognized that inexperienced, untrained seamen were more subject to the perils of the sea than veterans of the sea. (R. 230) With this in mind, petitioner calls to the Court's attention the following quotation from *Davis* v. *Parkhill-Goodloe Co.*, 302 F. 2d at 494 (5th Cir. 1962) which dealt with the duty *vel non* to instruct a seaman to wear a life vest:

> "Whatever a shipowner might be permitted to do with respect to *seasoned hands familiar with the peculiar hazards of the sea, it is plain that it could not absolve itself of the pervading obligation to furnish a seaworthy vessel and exercise a prudent care for seamen by leaving this important decision—to wear or not wear a life vest?—up to this inexperienced, untrained farm boy who had not yet begun to get his sea legs.* This is but the application of the familiar principle of salt water, amphibious and land-locked jurisprudence that there is a duty to warn in an effective way of dangers not reasonably known . . . *and a duty to take effective action in the light of the particular condition—here inexperience and ignorance of seagoing perils—of the particular seaman. . . .*" (Emphasis added)

In further support of petitioner's contention that the court below misapplied the law on this point, petitioner cites the following language from *Vickers* v. *Tumey*, 290 F. 2d at 429 (5th Cir. 1961) regarding the duty to instruct:

> "The jury could have found, as he swore, that he had received no adequate instruction. . . . On the other hand, it could have held . . . the *green horn* had been instructed and warned against the method used. . . ."
>
> *"Resolution of this fact dispute was for the jury."* (Emphasis added)

(B) *Assumption of Risk*

Further evidence of the Mississippi Supreme Court's misapplication of federal law is found in the court's statement that:

> "A person of even everyday common garden variety of intelligence just instinctively knows that he is taking some risk when he elects to jump from one level to another. . . . Any potential danger was perfectly apparent and obvious to any person of ordinary . . . intelligence." *Security Barge Line, Inc.* v. *Killebrew*, supra, at 463, 464.

These statements lead inescapably to the conclusion that the court below felt that petitioner was guilty of contributory negligence or that he assumed the risk of injury.

Such statements ignore the well established rule that in Jones Act cases:

> "contributory negligence and assumption of risk are not available defenses. The admiralty doctrine of comparative negligence applies." (*Jacob* v. *City of New York*, 315 U. S. at 755, 62 S. Ct. 854, 86 L. Ed. at 1170 (1942)).

See also, e. g., *The Arizona* v. *Anelich*, 298 U. S. 110 56 S. Ct. 707, 80 L. Ed. 1075 (1936), *Beadle* v. *Spencer*, 298 U. S. 124, 56 S. Ct. 712, 80 L. Ed. 1082 (1936), *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424, 59 S. Ct. 262, 83 L. Ed. 265 (1939), *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 63 S. Ct. 246, 87 L. Ed. 239 (1942).

(C) *Sufficiency of the Evidence*

When the Mississippi Supreme Court held that the trial court erred in submitting the case to the jury, it failed to state any test it might have employed in making such

a determination. This holding is, of course, easier to understand when it is recalled that the court below held that the respondent was under no duty to warn or to instruct the petitioner and that the petitioner assumed the risk of the injury he suffered.

The petitioner contends that, assuming, for purposes of argument only, that the respondent was under no duty to instruct him in the proper performance of his job, the holding below was nevertheless in striking conflict with controlling federal law. This court announced in *Ferguson* v. *Moore-McCormack Lines*, 352 U. S. 521, 523, 77 S. Ct. 459, 1 L. Ed. 2d 511, 514 (1957) the proper test for the submission of a Jones Act case to the jury as follows: "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury. . . ." This is also the standard employed for the submission of Federal Employers Liability Act cases to the jury (*Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957), and the rights under the Federal Employers Liability Act, 45 U. S. C. § 51, et seq. are incorporated by reference into the Jones Act.

This lenient test for the submission of a Jones Act or FELA negligence case to the jury has been religiously followed by the federal courts. See, e. g., *Varveris* v. *U. S. Lines Co.*, 249 F. 2d 89 (2nd Cir. 1957), *Livanos* v. *National Bulk Carriers, Inc.*, 248 F. 2d 815 (2nd Cir. 1957), *Rodriguez* v. *The Texas Co.*, 254 F. 2d 295 (2nd Cir. 1958), *Gibson* v. *Elgin, Joliet & Eastern Railway Co.*, 246 F. 2d 834 (7th Cir. 1957), *Webb* v. *Illinois Central Ry. Co.*, 352 U. S. 512, 77 S. Ct. 451, 1 L. Ed. 2d 503 (1957), *Carbon Black Export, Inc.* v. *The S. S. Monrosa*, 254 F. 2d 297 (5th Cir. 1958), *Vickers* v. *Tumey*, 290 F. 2d 426 (5th Cir. 1961),

LaFont v. *Otto Candies, Inc.*, 369 F. 2d 38 (5th Cir. 1966), *Butler* v. *Whiteman*, 356 U. S. 271, 78 S. Ct. 734, 2 L. Ed. 2d 754 (1958), *Nolan* v. *Greene*, 383 F. 2d 814 (6th Cir. 1967), *Southern Shell Fish Co.* v. *Plaisance*, 196 F. 2d 312 (5th Cir. 1952), *Gerald* v. *U. S. Lines Co.*, 368 F. 2d 343 (2nd Cir. 1966).

Stated another way,

> "The standard for determining whether plaintiff has presented sufficient evidence to raise a jury question as to defendant's negligence is whether, viewing the evidence in the record in the light most favorable to plaintiff, 'there is a complete absence of probative facts to support the conclusion reached' by the jury." (*Fleming* v. *American Export Isbrandtsen Lines, Inc.*, 451 F. 2d at 1331 (2nd Cir. 1971).

The legal theories under which the jury could have found the respondent negligent are numerous. There is evidence in the record that the respondent failed to instruct the petitioner on the safe method of performing his work (R. 74), that respondent was negligent in not employing a crew chief or captain who would instruct petitioner (R. 63, 256), that respondent was negligent for not enforcing safety rules (R. 256), that respondent was negligent in failing to provide a safe place to work to the petitioner (R. 248, 254, 132, 94, 250) and that respondent was negligent in failing to provide petitioner with the safe equipment needed in his work. (R. 248, 250, 254) As this court held in *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1946), the jury is free to speculate and make conjectures in reaching verdicts.

It is worthy of noting that the opinion of the court below failed to even acknowledge the duty of a shipowner

to provide crew members with a safe place to work and safe equipment needed to perform their work although this has repeatedly been held to establish a jury question on Jones Act negligence. *Southard* v. *Independent Towing Co.*, 453 F. 2d 1115 (3rd Cir. 1971), *Massey* v. *Williams-McWilliams, Inc.*, 414 F. 2d 675 (5th Cir. 1969), *Street* v. *Isthmian Lines, Inc.*, 313 F. 2d 35 (2nd Cir. 1963), *Sanford* v. *Caswell*, 200 F. 2d 830 (5th Cir. 1953), *Rey* v. *Colonial Nav. Co.*, 116 F. 2d 580 (2nd Cir. 1941), *Armit* v. *Loveland*, 115 F. 2d 308 (3rd Cir. 1940).

In *Southard* v. *Independent Towing Co.*, supra, the Court pointed out:

> "(a) ship must provide a safe place to work to a seaman . . . that duty encompasses a reasonably safe means of boarding, and departing from the vessel, and failure to discharge it constitutes negligence." 453 F. 2d at 1118.

See also, *United States Lines Co.* v. *Cummings*, 195 F. 2d 221 (9th Cir. 1952).

The duty of an employer to provide the crew members of a vessel with safe equipment and a safe place to work has been liberally construed. For example, in *Ferguson* v. *Moore-McCormack Lines*, 352 U. S. 521, 77 S. Ct. 459, 1 L. Ed. 2d 511 (1957), this Court upheld as proper the submission to the jury of a negligence claim based on the employer's failure to provide the injured seaman an ice cream chipper or other safe tool to loosen frozen ice cream. In *LaFont* v. *Otto Candies, Inc.*, 369 F. 2d 38 (5th Cir. 1966), a lower court ruling that no negligence or unseaworthiness was established by the fact that a seaman drank pine oil thinking it was apple juice, when both bottles were clearly labeled, was reversed and remanded since a

jury could have found the employer negligent in not providing the injured seaman a safe place to work, in that the pine oil should have been kept separate and away from the apple juice.

This Court has repeatedly announced that the Jones Act is to have uniform application, unaffected by local law, *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748 (1924), *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953), *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 63 S. Ct. 246, 87 L. Ed. 239 (1942), *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, 42 S. Ct. 475, 66 L. Ed. 927 (1922), *Chelentis* v. *Luckenbach Steamship Co.*, 247 U. S. 372, 38 S. Ct. 501, 62 L. Ed. 1171 (1918), and has diligently guarded the rights of Jones Act seaman and FELA employees by granting writs of certiorari when it appears that they have been denied a proper jury determination on the question of negligence. *Chicago, Rock Island & Pacific Ry.* v. *Devine*, 239 U. S. 52, 36 S. Ct. 27, 60 L. Ed. 140 (1915), *Seaboard Air Line R. Co.* v. *Padgett*, 236 U. S. 668, 35 S. Ct. 431, 59 L. Ed. 777 (1915), *Garrett* v. *Moore-McCormack Co.*, supra, *Schulz* v. *Pennsylvania R. Co.*, 350 U. S. 523, 76 S. Ct. 608, 100 L. Ed. 668 (1956), *Blair* v. *Baltimore & O. R. Co.*, 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490 (1945), *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493, reh. den. 353 U. S. 943, 77 S. Ct. 808, 1 L. Ed. 2d 764, *Brady* v. *Southern R. Co.*, 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 239 (1943).

Petitioner urges that these conflicts justify the issuance of a writ of certiorari not only for the protection of his rights but for the protection of all seamen who may in the future be injured within the territorial limits of Mississippi.

2. The Opinion of the Court Below Evidences a Total Misconception of the Admiralty Doctrine of Unseaworthiness Which Resulted in a Decision in Clear Conflict with the Decisions of This Court and the Other Federal Courts, Not Only on the Submission of Unseaworthiness Claims to the Jury But on What Conditions Might Render a Vessel Unseaworthy.

In reversing the trial court, the Mississippi Supreme Court held that "no evidence was adduced as to the unseaworthiness of the towboat ISSAQUENA or any of its barges" . . . "(t)he only 'condition' . . . was that there were both empty and loaded barges in the same tow." *Security Barge Line, Inc.* v. *Killebrew*, supra, at 462. The petitioner urges that in making such statements the court below again misunderstood and misapplied the controlling federal law.

As apparent authority for this holding, the Mississippi Supreme Court cited *Mitchell* v. *The Trawler Racer, Inc.*, 362 U. S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941 (1960), and *Usner* v. *Luckenbach Overseas Corp.*, 400 U. S. 494, 91 S. Ct. 514, 27 L. Ed. 2d 562 (1971), reh. den. 401 U. S. 1015, 91 S. Ct. 1247, 28 L. Ed. 2d 552.

In *Mitchell*, supra, this Court reversed and remanded a jury's finding that no unseaworthiness existed. That opinion in no way limited the doctrine of unseaworthiness, it merely re-emphasized that the duty to provide a seaworthy vessel is couched in terms of "reasonableness" and that the duty is not absolute. As this Court pointed out:

> "(I)t is essentially a species of *liability without fault*, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, *the liability*

> *is neither limited by conceptions of negligence nor contractual in character* . . . It is a form of absolute duty owing to all within the range of its humanitarian policy." 4 L. Ed. 2d at 947, 948. (Emphasis added)

Mitchell dealt primarily with a shipowner's duty relating to conditions that arise after the voyage has begun and in no way altered the well-established rule that a shipowner must provide his crew with a seaworthy vessel.

The *Usner* decision was cited for the proposition that a "condition" must exist to render a vessel unseaworthy. Considering the ample evidence set forth in the Record and in petitioner's statement of the case which established that no equipment was made available to the petitioner to travel from barge to barge (R. 265), no one ever instructed him as to the proper method of safely traveling between barges (R. 74) and that no one ever called petitioner's attention to the vessel's safety rules (R. 75), it appears that the court below concluded that an actual "physical" condition must be present to render a vessel unseaworthy. Further evidencing this narrow reading of *Usner* is the court's statement that the only "condition" present was the uneven level of the barges. The opinion totally ignores the shipowner's duty to provide safe equipment and a competent crew although *Usner* points out the duty of a shipowner to provide same. (*Usner* v. *Luckenbach,* 400 U. S. at 91 S. Ct. at 514, 27 L. Ed. 2d at 567).

The misconceptions of the court below as to the obligations of the respondent to the petitioner gave rise to another holding in direct conflict with the decisions of this Court. In its failure to recognize the breadth of unseaworthiness the Mississippi Supreme Court reversed the

verdict of the trial court jury. It is well settled that the issue of unseaworthiness is a question of fact to be decided by the jury as long as there is conflicting evidence in that regard, and not a question of law for an appellate court to decide. (See, e. g., *Morales* v. *City of Galveston*, 291 F. 2d 97 (5th Cir. 1961), *Lieberman* v. *Matson Navigation Co.*, 300 F. 2d 661 (9th Cir. 1962)). Indeed, it has been stated even more emphatically that "it will be a rare case where the issue of unseaworthiness as to the proximate cause of an injury is to be resolved for or against a shipowner as a matter of law". (*Jefferson* v. *Taiyo Katum, K. K.*, 310 F. 2d 582, 583 (5th Cir. 1962)). The evidence on which the jury could have found the M/V ISSAQUENA unseaworthy is detailed supra and will not be repeated here.

When faced with the question of setting aside jury verdicts in unseaworthiness cases, this Court held in *Atlantic and Gulf Stevedores* v. *Ellerman Lines, Ltd.*, 369 U. S. 355, 82 S. Ct. 780, 7 L. Ed. 2d 798, 803 (1962) that "neither we nor the court of appeals can redetermine facts found by the jury any more than the District Court can pre-determine them."

With all respect for the court below, petitioner is constrained to submit that the opinion of the Supreme Court of Mississippi failed to view the evidence before the trial court in the light most favorable to petitioner, appellee in the court below, and that this Court can fully appreciate the evidence of negligence and the unseaworthiness of the respondent's vessel only by an examination of the Record of the trial in the Circuit Court of Washington County, Mississippi.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP MANSOUR
P. O. Box 1406
Greenville, Mississippi 38701
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Philip Mansour, hereby certify that I have this day mailed, postage prepaid, by U. S. mail, three true and correct copies of the Petition for Writ of Certiorari in the above styled cause to Honorable Frank Thackston, Jr., P. O. Box 918, Greenville, Mississippi 38701, attorney of record for respondent. I further certify that all parties required to be served have been served.

This 18th day of July, 1973.

PHILIP MANSOUR
P. O. Box 1406
Greenville, Mississippi 38701
Counsel for Petitioner

SECURITY BARGE LINE, INC.

v.

Zachary KILLEBREW.

No. 47122.

Supreme Court of Mississippi.

May 29, 1973.

Rehearing Denied June 18, 1973.

The Circuit Court, Washington County, B. B. Wilkes, J., found for seaman who brought personal injury action against employer and employer appealed. The Supreme Court, Robertson, J., held that a seaman who was not compelled or ordered to jump from empty barge to loaded barge in tow and who failed to establish any unseaworthiness of towboat or barges was not entitled to recover from employer for injuries sustained when he jumped.

Reversed and judgment for appellant.

1. Seamen Key No. 29(5.14)

Evidence in action against employer by seaman who was injured when he jumped from unloaded barge of tow to coaming of loaded barge failed to establish that tow boat or its barges were unseaworthy.

2. Master and Servant Key No. 150(2)

Employer is under no duty to instruct employee that in performing his work he should not jump from greater height to lower height.

3. Negligence Key No. 105

Person of everyday common garden variety of intelligence instinctively knows that he is taking some risk when he elects to jump from one level to another.

4. Seamen Key No. 29(4)

Seaman who was not compelled or ordered to jump from empty barge to loaded barge in tow and who failed to establish any unseaworthiness of towboat or barges was not entitled to recover from employer for injuries sustained when he jumped.

Lake, Tindall & Hunger, Frank S. Thackston, Jr., Greenville, for appellant.

Barrett, Barrett & Barrett, Lexington, Mansour & Kilpatrick, Greenville, for appellee.

ROBERTSON, Justice:

Zachary Killebrew sued Security Barge Line, Inc., in the Circuit Court of Holmes County for back injuries allegedly sustained when he jumped from the deck of an empty barge to the coaming (hatch cover) of a loaded barge.

This case was transferred from the Circuit Court of Holmes County to the Circuit Court of Washington County and subsequently tried in that Court. The jury returned a verdict for $60,000 and on motion for a new trial the court granted the motion on damages alone unless the plaintiff entered a remittitur of $25,000. The plaintiff entered the remittitur, the judgment was reduced to $35,000 and the motion for a new trial was overruled.

Appellant appeals, and appellee cross-appeals assigning as error the reduction of the $60,000 judgment to $35,000.

On January 28, 1971, Killebrew, a young man twenty years of age, of Tchula, Mississippi, was employed by Security Barge Line, Inc., as a deckhand and boarded the

towboat ISSAQUENA at Hickman, Kentucky, while it was pushing a tow of loaded and unloaded barges up the Mississippi River. Each barge is about 200 feet long and 35 feet wide. He had previously worked for Security as a deckhand for about two and a half months back in 1969. Appellee explained his job in this way:

> "[Y]ou're all the time tightening ratchets, tightening them and carrying them, and tying the barges together, walking back and forth, getting stuff to carry out there, and you've always got to have something in your hand like a cheater pipe or a pair of tooth picks, what they call them, to hold the ratchet in place while you tighten it."

On February 17, 1971, the Issaquena and its tow were northbound on the Mississippi River. The tow consisted of about twelve barges, four deep and three wide, with the eight outside barges being empty and the four middle barges being full of cargo, all being lashed together and pushed by the towboat ISSAQUENA. An empty barge draws about two feet of water and the deck of an empty is about six or seven feet above the deck of a loaded barge alongside.

Killebrew explained what he was doing:

> "The captain had told me to string out light cord to where we would have starboard and port light. I took a cord all the way out to just about almost to the middle of the loaded barge. I run out, so I went back to get some more light cord."

As he was leaving the ISSAQUENA with another light cord, the captain told him to carry a leading line out to the end of an empty barge. Killebrew explained:

> "[S]o I had to crawl up on the tow knee to get onto the empty, so I walked down the empty and carried the leading line out on the end of the empty."

The tow knee is a wide steel device across the front of a towboat used in pushing the barges. The towboat being wider than a barge, all three facing barges are lashed to the tow knee and the towboat ISSAQUENA, by means of the tow knee, pushed the entire tow. The tow knee on the towboat side has steps across the entire front of the towboat down to the deck of the towboat. After carrying the leading line to the end of the empty barge, Killebrew walked about halfway back on the empty barge and when about 100 feet from the tow knee Killebrew decided to jump from the empty barge to the coaming or hatch cover of the loaded barge. The coaming would be about two feet lower and about 1½ feet from the deck of the empty barge. Appellee testified that when he landed on the hatch cover of the loaded barge it jarred him and a sharp pain went through his back. He complained to the captain, but did not ask to be put ashore and continued to work until the towboat and its tow reached Greenville, about 10 days later.

About a week or two after he had returned home, he complained to the port captain and, at his suggestion, went to see Dr. Browning in Greenwood. After being in traction for about three weeks, Killebrew returned to his home and drove a tractor for his uncle for a short time. He went to work on May 15th for Peaster Tractor Company, where he has worked ever since.

Killebrew was examined on July 2, 1971, by Dr. Elmer Nix, an orthopedic surgeon of Jackson. His diagnosis was "probable healing herniated" disc in his lower back. Doctor Nix stated that laymen refer to this condition as a ruptured or slipped disc.

All of appellee's hospital and medical expenses were paid by appellant, and appellee was paid his full salary up to May 15, 1971, when he went to work for Peaster Tractor Company. He has gotten a raise and is now making $100 a week.

The bases of the appellee's claim for damages were the unseaworthiness of the towboat and its barges and the negligence of the appellant, in failing to furnish appellee with a safe place to work, failure to properly instruct the appellee in the course of his duties and failure to warn the appellee of the dangers incident to his work.

No evidence was adduced as to the unseaworthiness of the towboat ISSAQUENA or any of the barges in tow. The duty of the shipowner is well stated in Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960), wherein the Supreme Court said:

> "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute but it is a duty only to furnish a vessel and appurtenances *reasonably fit for their intended use.* The standard is not perfection, but *reasonable fitness;* not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service. Boudoin v. Lykes Bros. S. S. Co., 348 U.S. 336, 75 S.Ct. 382, 99 L.Ed. 354." (Emphasis added). 362 U.S. at 550, 80 S.Ct. at 933, 4 L.Ed.2d at 948-949.

[1] In Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 91 S.Ct. 514, 27 L.Ed.2d 562 (1971), reh. den. 401 U.S. 1015, 91 S.Ct. 1247, 28 L.Ed.2d 552, unseaworthiness is described as a *condition* which makes the ship not reasonably fit for its intended use. The only "condition", insofar as

the ISSAQUENA and its barges were concerned, was that there were both empty and loaded barges in the same tow, a condition which, by the undisputed testimony, exists 95% to 99% of the time. In other words, it's a standard and customary thing, absolutely necessary in the river freight business, and a condition of doing business. The ISSAQUENA and its barges were not proved to be unseaworthy in any sense of the term.

[2, 3] Where a shipowner has been held liable to a seaman injured during the process of jumping from one vessel to another, the basis for such liability has been that the seaman was "forced" to jump since no other means of moving from vessel to vessel was available to him or that he was "ordered" to jump by his superiors. Neither of these elements was present in this case. Killebrew was under no compulsion to jump. He could have walked about 100 feet more and descended the steps on the tow knee from the empty barge to the ISSAQUENA, and then stepped from the ISSAQUENA to the loaded barge by means of the tow knee. Rather than walk the additional 100 feet, he suddenly and on his own decided to jump. He could have sat down and extended his feet over to the coaming, or he could have held on to the edge of the empty and dropped to the deck of the loaded barge. He could have simply stepped across because the coaming was only 1½ feet away. If there were any danger in jumping, it was perfectly obvious to any person of average or reasonable intelligence. It was not a danger peculiar to ships or barges. A workman putting a roof on a long chicken-house, rather than use a ladder some distance away, could suddenly decide to jump from the roof to the ground. An employer is under no duty to instruct an employee that in performing his work he should not jump from a greater

height to a lower height. A person of even everyday common garden variety of intelligence just instinctively knows that he is taking some risk when he elects to jump from one level to another.

In Casselmann v. Tug CAPTAIN KELLY, 215 F.Supp. 240 (D.C.La., 1963), a seaman was injured while attempting to jump from a barge onto the deck of a ship. At the time the jump was attempted, the vessel was swinging away from the barge and the distance between the two ships was increasing. The Court stated:

> "Casselmann did not wait for Captain Lafleur to swing the Tug CAPTAIN KELLY back against the Barge SINCLAIR 17, which would have allowed him to step from the Barge SINCLAIR 17 to the upper deck of the Tug CAPTAIN KELLY. Instead, Casselmann took it upon himself to jump out four to six feet over open water and down five or six feet to the deck of the Tug CAPTAIN KELLY, which was still swinging away from the Barge SINCLAIR 17. He landed on his left leg, causing the injury complained of herein.
>
> . . .
>
> "The Tug CAPTAIN KELLY was not unseaworthy because a ladder was not on board. The absence of the ladder was unimportant because had Casselmann waited for the vessel to be swung back into position, he could have stepped across from the Barge SINCLAIR 17 to the upper deck of the Tug CAPTAIN KELLY and he would not have been injured. . . . Thus, the absence of the ladder played no part in his injury.
>
> . . .
>
> "The sole proximate cause of Casselmann's injury was his own gross negligence in jumping from the

deck of the Barge SINCLAIR 17 to the deck of the Tug CAPTAIN KELLY." 215 F.Supp. at 242-243.

In Debose v. Loppersum, 438 F.2d 642 (5th Cir. 1971), a *Sieracki* seaman sued the shipowner charging Jones Act negligence and unseaworthiness. Judgment was rendered for the shipowner, which on appeal by the seaman was affirmed. The 5th Circuit Court of Appeals, in so affirming, said:

> "While the plaintiff and others were loading bundles of lumber aboard the ship, difficulty was experienced in the placement of one of the last bundles. The plaintiff elected to go beneath the deck to guide the bundle into place and he contends that while he was 'guiding' the lumber he injured his back. The district court found from the evidence that the equipment involved was reasonably fit for use in stowage of the cargo in question and that the method of stowage was reasonably safe. The court further found that the plaintiff's election to go beneath deck was his own decision and was not ordered or recommended by the vessel owners or the stevedoring company for which he worked. Giving full consideration to all of the facts, it was decided that the plaintiff had failed to prove by a preponderance of the evidence that the defendants did not furnish the plaintiff a seaworthy vessel nor did the plaintiff show that his injury was caused by any negligence attributable to the defendants or by an unseaworthy condition. The court concluded, therefore, that the injury to the plaintiff was 'the result of his own actions and not of any unseaworthy condition, insufficient personnel or equipment, or improper or reasonably unsafe method or negligence on the part of anyone except himself.' " 438 F.2d at 642-643.

[4] Inasmuch as the appellee was not "forced" to jump, nor "ordered" to jump, and inasmuch as any potential danger was perfectly apparent and obvious to any person of ordinary and average intelligence, and inasmuch as appellee acted freely and voluntarily, no negligence of any kind was proved against the shipowner nor was there any evidence of any kind that the vessels involved were unseaworthy in any way. Therefore, the appellee simply did not make out a case, and the court should have directed a verdict for the appellant.

The judgment for the appellee is, therefore, reversed and judgment rendered here for the appellant.

Reversed and judgment here for appellant.

GILLESPIE, C. J., and INZER, SUGG and BROOM, JJ., concur.

IN THE SUPREME COURT OF MISSISSIPPI

Decisions Handed Down June 18, 1973

BROOM, J.

46,657 Lea Spears v. State; Circuit, Warren; Petition for Rehearing Denied.

WALKER, J.

47,182 Eugene Montgomery, et ux v. Donald Parrish; Circuit, Holmes; Affirmed.

SUGG, J.

47,312 Dewitt Rush v. State; Circuit, Neshoba; Petition for Rehearing Denied.

ROBERTSON, J.

47,191 Miss. State Highway Comm'n v. J. C. Lyle, et al; Circuit, Scott; Affirmed.

SMITH, J.

X 47,155 Frederick Gardiner Cox, Jr. v. Mrs. Alma Van Hook Cox; Chancery, Hinds; Reversed, Decree Here for Appellant, and Appellant Discharged.

X 47,158 In the Matter of the Estate of Myer A. Lewis, Dec'd., John Hart Lewis v. Deposit Gty. Nat'l Bank, Myer A. Lewis, Jr., Elaine Lewis Mack, et al; Chancery, Hinds; Affirmed.

47,285 George Ray Leggett v. State; Circuit, Forrest; Affirmed.

X 47,154 William D. Hairston, et al v. Brenda Diane Bell; Chancery, Sunflower; On Motion to Correct Judgment; Affirmed In Part and Reversed in Part.

INZER, J.

47,176 Dixie R. Lance v. Miss. Employment Security Comm'n.; Circuit, Grenada; Affirmed.

47,122 Security Barge Line, Inc. v. Zachary Killebrew; Circuit, Washington; Petition for Rehearing Denied.

47,382 Paul Wayne Nash v. State; Circuit, Jackson; Petition for Rehearing Denied.

PATTERSON, J.

X 47,172 Evelyn Gandy, Comm'r. of Insurance, A. F. Summer, Attorney General, State of Miss. v. Reserve Life Ins. Co., Chancery, Hinds; Affirmed.

47,235 Rayvon Cochran v. State; Circuit, Wayne; Petition for Rehearing Denied.

RODGERS, P.J.

X 47,379 C. B. Jones v. State; Circuit, Hinds; Reversed and Remanded. Motion to Strike Overruled.

47,327 Nina Joan Smith v. State; Circuit, Jackson; Petition for Rehearing Denied.

GILLESPIE, C.J.

47,082 Mrs. Marian M. Jenkins v. Ernest Lee Jenkins; Chancery, Hinds; Petition for Rehearing Denied.

47,167 John McCraw, Jr. v. Margaret McCraw Mitchell, etc.; Chancery, Bolivar; Petition for Rehearing Denied.

PER CURIAM

47,436 Mrs. Billy Gene Montgomery v. Hoover Mayfield; Circuit, DeSoto; Motion to Dismiss Appeal Sustained.

47,476 Britton & Koontz First National Bank, Natchez, Miss., by Clarence M. Young v. Natchez State Bank & Trust Co., et al; Chancery, Adams; Motion to Advance Sustained. Case Set for Week of September 17, 1973.

47,611 Don McCallum, et ux v. William Garrett; Motion to Dismiss Sustained.

47,628 Texas Road Boring Co. Louisiana-Mississippi v. George R. Parker, Jr., et al; Motion of Appellant to Incorporate another Original Supreme Court Record as a Part of the Appellate Record on this Appeal Sustained.

47,653 Dud Lewis, Jr. v. Clotene Lewis; Motion to Docket and Dismiss Sustained.

ONLY CASES MARKED "X"
HAVE WRITTEN OPINIONS.

Respectfully submitted,

Julia H. Kendrick, Clerk
Yvonne Burnham, D. C.

FILED
AUG 16 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-184

ZACHARY KILLEBREW,
Petitioner,

versus

SECURITY BARGE LINE, INC.,
Respondent.

BRIEF OF SECURITY BARGE LINE, INC. IN OPPOSITION TO PETITION OF ZACHARY KILLEBREW FOR WRIT OF CERTIORARI TO MISSISSIPPI SUPREME COURT

J. A. LAKE and
FRANK S. THACKSTON, JR.
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INDEX

Page

CITATIONS i

I. STATEMENT OF THE CASE 1

II. THE ISSUE BELOW 2

III. THE ISSUE HERE 3

CONCLUSION 8

CERTIFICATE OF SERVICE 9

CITATIONS

STATUTE

28 U.S.C.A. ¶1257(3) 3

CASES

Carter v. Atlanta and St. A. B. R. Co., 338 U.S. 430, 438-439, 94 L.Ed. 236, 243 (1949) 3

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393, 67 L.Ed. 712, 714 (1923) ... 5

Wilkerson v. McCarthy, 336 U.S. 53, 66-67, 93 L.Ed. 497, 506 (1949) 4

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BRIEF OF SECURITY BARGE LINE, INC. IN OPPOSITION TO PETITION OF ZACHARY KILLEBREW FOR WRIT OF CERTIORARI TO MISSISSIPPI SUPREME COURT

I. STATEMENT OF THE CASE

Petitioner Killebrew, a resident of Holmes County, Mississippi, filed suit in the State Circuit Court of that county against his former employer, SBL, Inc., seeking damages for personal injuries allegedly resulting from SBL's negligence and the the unseaworthiness of M/V ISSAQUENA, a 5000-horsepower Mississippi River towboat.

On Security's motion for change of venue, the suit was transferred to the Circuit Court of Washington County, Mississippi, at Greenville and the case was

tried by a jury there. A division of the U.S. District Court for the Northern District of Mississippi sits at Greenville and petitioner could have filed in that Court, but did not.

As stated in petitioner's brief, the jury in the Circuit Court of Washington County returned a verdict for the petitioner in the amount of $60,000.00. This was so wholly unsupported by any evidence that the trial Judge ordered a remittitur thus reducing the verdict to $35,000.00. The respondent, Security Barge Line, appealed to the Mississippi Supreme Court and that Court found as to the Circuit Court trial that

> "— no negligence of any kind was proved against the ship owner nor was there any evidence of any kind that the vessels were unseaworthy in any way. Therefore, the Appellee (Killebrew) simply did not make out a case and the Court should have directed a verdict for the Appellant."

The Mississippi Supreme Court reversed the lower Court and entered judgment for Security Barge Line, the respondent here.

II. THE ISSUES BELOW

The issues both in the Circuit Court of Washington County and in the Mississippi Supreme Court involve nothing more than "the drawing of allowable inferences from a necessarily unique set of circumstances." These factual issues in the lower Courts were and are

of no interest to anyone except the parties herein. The case involved no conflict between the Court of Appeal and no principles of importance to the public.

III. THE ISSUE HERE

The sole question here is whether under the provisions of 28 U.S.C.A. §1257(3) a writ of certiorari should issue to the Mississippi Supreme Court, in order that this Court might decide whether on nothing more than the unique factual circumstances in this case — the Trial Court or the Mississippi Supreme Court was correct.

There is no "federal question" involved in this case. Even if there were, this Court is not obligated to review it. Indeed, this Court's proper role is quite limited. Mr. Justice Frankfurter stated the situation thus:

> "Where a case involves no general principle requiring pronouncement but merely its own unique circumstances —" a writ should not be granted *Carter v. Atlanta and St. A. B. R. Co. 338 US 430, 438-439, 94 L Ed 236, 243 (Separate opinions).*

In the same opinion, referring to the particular case, Mr. Justice Frankfurter said:

> "There is merely a difference in the application of professedly settled rules to the circumstances of this particular case — For me it is decisive that since the merits involve mere-

ly the evaluation of the unique facts in the record, the case does not fall within the proper business of the Court." (idem.)

In *Wilkerson v. McCarthy 336 US 53, 66-67, 93 L Ed 497, 506* (1949), Mr. Frankfurter again addressed the point:

> "Considering the volume and complexity of the cases which obviously call for decision by this Court, and considering the time and thought that the proper disposition of such cases demands, I do not think we should take cases canvassed by two and sometimes three Courts *even though those facts may have been erroneously appraised.* The division in this Court would seem to demonstrate beyond peradventure that nothing is involved in this case except the drawing of allowable inferences from a necessarily unique set of circumstances."

Referring to the Court's power to control its docket, he then says:

> "Such power carries with it the responsibility of granting review only in cases that demand adjudication on the basis of importance to the operation of our federal system; *importance of the outcome merely to the parties is not enough.* It has been our practice to *dismiss* a writ of certiorari even after it was granted *where argument exposed a want of conflict or*

revealed that the case involved no more than its particular facts."

In support of his position, Mr. Frankfurter cited the opinion of Chief Justice Taft speaking for a unanimous Court in *Layne & Bowler Corporation v. Western Well Works, Inc. 236 US 387, 393, 67 L Ed 712, 714* where the Chief Justice said that certiorari should *not be granted* —

> "— except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Court of Appeal. *THE PRESENT CASE CERTAINLY COMES UNDER NEITHER HEAD."*

The last sentence of the quotation immediately above fits the Killebrew petition perfectly. A very brief look at Killebrew's own testimony confirms this, and for that purpose a short digest of the testimony follows.

R65: Killebrew was first employed by Security on 4-9-69 and quit on 6-30-69: he was rehired on 1-28-71 and quit 2-28-71. He was *NO GREEN HORN.*

R111: Safety Rules (Exhibit 3, p. 202) were posted on bulletin between crew's quarters and galley and Killebrew passed them at least three times a day. RULE 4 forbade jumping.

R202: Killebrew SAW SAFETY RULES but never read them because "nobody ever told me to read them."

R101: Was "stringing" electric light cord from "running lights" on tow when injured. NO HEAVY DUTY — NO COMPLICATED MARINE WORK.

R127: Was one of THREE crewmen engaged in "stringing lights." NORMAL CREW for that job.

R129: Nothing difficult about the job.

THERE IS NO TESTIMONY ANYWHERE OF ANY WITNESS TO KILLEBREW'S "JUMP"!

R206: The ISSAQUENA'S tow of empty barges riding high in the water and loaded barges riding low in the water was usual and common, occurring 90% to 95% of the time. See Security Exhibit 1 (R110).

R93: Killebrew got on empty barge by walking up towknee of M/V ISSAQUENA.

R96-97: Was only 100 feet from towknee when he "jumped," and could very easily have walked 100 feet and gone down same towknee steps which he had previously climbed.

R129: "Nobody told me not to jump," and nobody told him to jump. No one else with him when he elected to jump.

R129: Had to put out running lights on tow everytime dropped or picked up barges — routine job for deckhands such as Killebrew.

R226-7: Barges tied tightly together flush, and no space between.

R109: Killebrew describes his action as a "jump-step."

R132: Killebrew says his "jump" was "3 feet down and 4 feet across." (5 feet along hypotenuse of right triangle).

R265: To use available ladder would be *inconvenient*
R268: — but "it could have been used." (At R227 through R262, Captain Herrington testified that there was one 8-foot ladder in locker room 12 feet from tow-knee up which Killebrew walked, and that there were 4 other ladders hung on sides of M/V ISSAQUENA and available to crew. He testified that the 8-foot ladder weighed no more than 15 pounds).

R116-7: Killebrew admits he continued his regular deckhand duties after alleged injury and never requested that he be put ashore to hospital.

R77: Treated by Dr. Browning about 3 weeks after leaving M/V ISSAQUENA. (See Killebrew, Exhibit 6, R157). Last visit 5 May 1971 (R159) by Dr.

Nix early July 1971 and February 1972. NO OTHER TREATMENT.

R123: Worked steadily for Peaster Tractor Company ("mechanicing" R80) from May, 1971 to 4-3-72 making $350.00 per month (R80).

R135: No complaint about back "after first few months" of Peaster employment.

The Mississippi Supreme Court simply held that Killebrew's evidence did not reveal *any* negligence OR unseaworthiness chargeable to Security. The Court took no issue with any Federal rule.

CONCLUSION

The case involves MERELY THE EVALUATION OF THE UNIQUE FACTS IN THE RECORD.

The facts in the case have been canvassed by two Courts. Even though those facts may have been erroneously appraised, (which respondent certainly does *not* concede) the outcome is of importance merely to the parties. No conflict between Court of Appeal is involved and there is nothing here which is of importance to the public as distinguished from the parties.

The petition for issue of writ of certiorari should be denied.

RESPECTFULLY SUBMITTED.

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CERTIFICATE

I certify that I have this day mailed postage prepaid by U.S. Mail, three true copies of the foregoing brief in opposition to the petition for writ of certiorari in the above case to Honorable Philip Mansour, P. O. Box 1406, Greenville, Mississippi 38701, attorney of record for petitioner; and that thereby all parties required to be served have been served.

THIS, the ____ day of August, 1973.

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